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Dated: December 10, 2008

Signature:

(Thomas M. Finetti)

Docket No.: REGIM 3.3-012  
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of: :  
Msika et al. :  
 :  
Application No.: 10/088,851 : Group Art Unit: 1655  
 :  
Filed: March 21, 2002 : Examiner: M.C. Flood  
 :  
For: USE OF A PLANT OIL PRODUCT AS :  
AN AGENT FOR INCREASING THE :  
SYNTHESIS OF SKIN LIPIDS :

RESPONSE TO RESTRICTION REQUIREMENT AND ELECTION OF SPECIES

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Madam:

This communication is in response to the Office Action mailed November 10, 2008, setting forth a Restriction Requirement and a Requirement For Election Of Species in the above-identified application.

Foremost, Applicants note that this is the second Restriction Requirement (the first issued on December 5, 2005) and the second Requirement For Election Of Species (the first issued on May 3, 2007) presented by the Patent Office since December of 2006. Not only are these the second requirements issued, but the requirements are similar to those previously presented, and in fact, in the case of the Restriction Requirement, identical.

After traversing each of these prior actions, the Examiner found Applicants' arguments persuasive and agreed to examine each of the alleged "inventions" or species together. Applicants do not understand why the Patent Office is

revisiting these issues especially after they were withdrawn and Requests for Continued Examinations were subsequently filed by the Applicants. Moreover, it appears that the Examiner was able to find and cite new art, even across the alleged inventions. (*See Office Action of April 3, 2008.*)

Applicants submit that the Restriction Requirement and Requirement For Election Of Species should be withdrawn. The restrictions and elections requested in the present Office Action will only cause piecemeal prosecution of this application which is unfair to the Applicants, and unnecessary and unreasonable under the Patent Office rules. Moreover, Applicants have already expended significant amounts of time, effort, and money in responding to these issues previously, not to mention significantly restricting the scope of the pending claims in order to facilitate prosecution of this case on the merits. (*See Resp. September 1, 2005.*)

If these restrictions are not withdrawn, Applicants will be forced to Petition the Patent Office.

Of course, Applicants understand that a complete reply requires an election of an "invention" and species to be examined. Applicants do so with traverse.

#### **Restriction Requirement**

In the Office Action, the Examiner required restriction to one of the following inventions under 35 U.S.C. §121:

I. Claims 61, 62, 70-72, 77, 78, 82, 84 and 91, drawn to a method of treating a skin condition of a subject comprising administering an effective amount of a composition comprising at least one plant oil product selected from the group consisting of oil distillate of

sunflower oil and unsaponifiable materials from sunflower oil wherein a quantity of skin lipids increase after administration of the composition [of] the skin and wherein the skin condition is sensitive skin, dry skin, pruritus, ichthyosis, acne, xerosis, atopic dermatitis, cutaneous desquamation, skin subjected to actinic radiation or skin subjected to ultraviolet radiation, classified in class 424, subclass 764.

II. Claims 88 and 92, drawn to a method of treating a skin condition of a subject comprising administering an effective amount of a composition comprising at least one plant oil product selected from the group consisting of oil distillate of sunflower oil and unsaponifiable materials from sunflower oil wherein a quantity of skin lipids increase after administration of the composition [of] the skin, wherein the plant product is a food additive for humans and/or animals; and wherein the skin condition is sensitive skin, dry skin, pruritus, ichthyosis, acne, xerosis, atopic dermatitis, cutaneous desquamation, skin subjected to actinic radiation or skin subjected to ultraviolet radiation, classified in class 424, subclass 439.

In response, Applicants hereby elect the invention of Group I, corresponding to claims 61, 62, 70-72, 77, 78, 82, 84, and 91. This election is made with traverse. Of course, Applicants reserve the right to file divisional applications for any non-elected subject matter.

Applicants respectfully submit that a search for the "invention" of Group I will necessarily require consideration of the subject matter of the "invention" of Group 2, since claims 88 and 92 contain all of the limitations of claims 61 and 91, plus an additional limitation, namely, that the plant

oil product is an additive. Therefore, while the claims may be primarily classified differently, a search for both "inventions" should be co-extensive. Thus, no additional burden is created by the Patent Office by searching all of the claims of the pending application together.

**Requirement For Election Of Species**

The Examiner also indicated that the claims require two recitations, each of which read on at least two distinct species. Thus, the Examiner required Applicants to elect a single disclosed species from each group for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable.

Group A: The distinct species of plant oil products, namely either an oil distillate of sunflower oil or an unsaponifiable materials from sunflower oil; and,

Group B: The distinct species of skin condition, namely either sensitive skin, dry skin, pruritus, ichthyosis, acne, xerosis, atopic dermatitis, cutaneous desquamation, skin subjected to actinic radiation or skin subjected to ultraviolet radiation.

In response to the Requirement For Election Of Species, Applicants hereby elect the species as follows:

Group A: Unsaponifiable materials from sunflower oil. Applicants believe that claims 61, 62, 70-72, 76, 77, 82, 84, 85, and 88-92 are readable on this election.

Group B: Atopic dermatitis. Applicants believe that claims 61, 62, 70-72, 76, 77, 82, 84, 85, and 88-92 are readable on this election.

This election is made with traverse.

With regard to the election of Group A, oil distillate of sunflower oil is oil which contains a fraction rich in unsaponifiable materials. The remaining part is composed of sunflower triglycerides. (See *Specification* page 3, line 35 to page 4, line 8.) Consequently, Applicant respectfully submits that these species do not contain different chemical constituents having divergently different biological and/or biochemical functions. The biological and/or biochemical functions of oil distillate of sunflower oil and unsaponifiable materials from sunflower oil are clearly related, and the search for oil distillate of sunflower and unsaponifiable materials from sunflower oil should be co-extensive. Thus, no additional burden is created on the Patent Office by searching both of these allegedly distinct species together.

With regard to the election of Group B, Applicants respectfully submit that the conditions listed in the claims are all skin conditions of the epidermis, or the outer layer of the skin. Consequently, Applicants respectfully submit that these skin conditions are not characterized by divergently different clinical manifestations, etc., as alleged by the Examiner. The skin conditions are clearly related, and a search for the list of skin conditions should be co-extensive. Thus, no additional burden is created on the Patent Office by searching both of these allegedly distinct species together.

In the event any fee is due in connection with the present response, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: December 10, 2008

Respectfully submitted,

By   
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